In The Supreme Court of The United States

OCTOBER TERM, 1941

No. 575

BEN MAY,

Petitioner,

Versus

THE MIDWEST REFINING COMPANY, STANDARD OIL COMPANY, and STANOLIND OIL AND GAS COMPANY.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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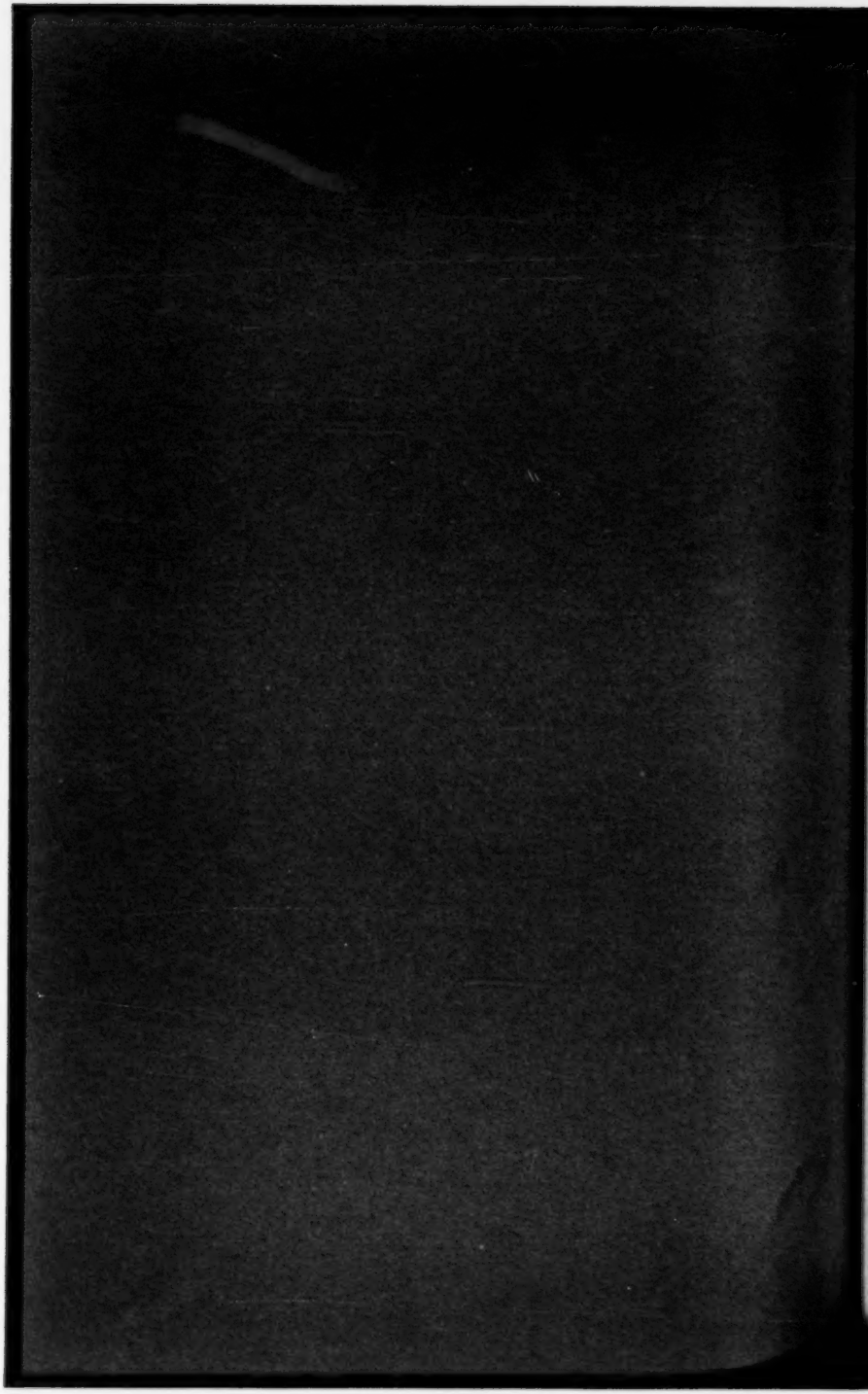

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the District of Maine is found in *May* vs. *Midwest Refining Co.*, et als, 25 Fed. Supp. 560. The opinion of the Circuit Court of Appeals for the First Circuit affirming the District Court's decision is found in *May* v. *Midwest Refining Co.*, et als, 121 Fed. (2d) 431.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941 (R. 432). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a); 43 Stat. 936).

STATEMENT OF FACTS

The respondents are willing to accept the "Summary Statement of Matter Involved" as set forth by the petitioner on pp. 2-6 incl. of the Petition with the following exceptions:

1. On p. 2 at line 13 of the Petition, the petitioner states that the bill alleges that the Standard Oil Company * * * * * * "forced said sale to itself and its controlled subsidiary, Stanolind Oil & Gas Company, *at a price which was inadequate to the extent of at least millions of dollars.*" (Italics supplied). This is misleading. There is no general allegation in the amended bill of complaint that the price was inadequate. Such allegation did appear in the original bill but was omitted in the amended bill. The allegation in the amended bill (Par. XII of amended bill: Rec. p. 266) sets forth that "the consideration * * * * was admittedly inadequate to the extent of millions of dollars *of interest* which was charged to or paid by the said Standard Oil Company in the latter part of November, 1932." This is a complaint that at the time of the sale on November 1, 1932, the agreed purchase price was inadequate to the extent of millions of dollars that were subsequently paid by Standard. It is a complaint about a wrong, if it were a wrong, which was righted before the bill of complaint was brought and is therefore not an issue in the case. It is thus apparent that the bill contains no general allegation of inadequate price and that the special allegation of inadequacy is of academic interest only, the amount by which it is alleged the consideration was inadequate having been paid weeks before this

action was commenced. The significance of this point will appear in the argument (Infra p. 10).

2. The respondents reject that portion of the first full paragraph on p. 4 of the Petition which begins "From these allegations" (line 11) and ends with "upon this assumption" (line 15) as argumentative and not germane to the statement of facts. Respondents concede that the special motion alleged that plaintiff's share in any recovery under prayers (d), (e), (f) and (g) would be a small fraction of the expense to which respondents would be put in taking testimony and preparing the cause for trial on the merits.

3. Respondents reject the second paragraph on p. 5 of the Petition as argumentative and beyond the proper scope of the statement of facts.

4. The respondents agree that the United States Circuit Court of Appeals for the First Circuit affirmed the decree of the District Court for the District of Maine granting said special motion and dismissing petitioner's complaint as appears in the second paragraph on p. 7 of the Petition but deny that in so doing the Circuit Court of Appeals was "thereby sanctioning and approving a radical departure from the accepted and usual course of judicial proceedings in minority stockholder suits."

ARGUMENT

At the outset respondents wish to correct the impression the petitioner seeks to create that this case establishes a precedent of far reaching importance. He would have this Court believe that the decision ignores all established practice in minority stockholder suits, disregards the corporate fiction and introduces a dangerous new doctrine into the law. This is emphatically not so. The case is so unique on its facts that it is unlikely that a similar situation will ever

occur again. A combination of circumstances has produced a situation in which the petitioner, an exceedingly small minority stockholder, is for all practical purposes the only stockholder interested. The corporation has been liquidated. All other stockholders have either sold their holdings to Standard Oil Company or have accepted years ago without protest their liquidating dividend. Under these circumstances the court below refused to order the rescission of the sale of $80,000,000 worth of assets of every description made more than six years before in the face of an offer to pay to petitioner all he could have lost on his own allegations, plus counsel fees and costs. In so doing the court blazed no new trail but merely applied the well recognized rule of equity that, as the Circuit Court of Appeals put it in its opinion (121 Fed. (2d) at p. 438), "since it is the function of a court of equity to do equity it may decline to grant relief of an equitable nature when such relief would produce an inequitable result." That is all there is to this case.

Viewed in this light the respondents believe that the question presented as set forth on p. 7 of the Petition should be revised to read as follows: Whether a court of equity may in its discretion refuse relief to a minority stockholder where the granting of such relief would produce an inequitable result.

The sole ground relied upon by the petitioner for the granting of the writ is the so-called "sixth reason" set forth in the rules, (U. S. Supreme Court Rule 38, Par. 5(b); namely, that the Court of Appeals in affirming the decision of the lower court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision."

By relying on this ground alone the petitioner has conceded that none of the other five grounds are applicable. We

submit that the sixth likewise does not apply to the case at bar.

As said in Hughes Federal Practice, Sec. 6306:

> "The sixth reason * * * * defines the categories in which certiorari is used in its ancient nature as an extraordinary writ. It concerns situations with which certiorari was anciently identified, providing for supervision akin to that exercised on mandamus and other extraordinary writs."

See also 14 C.J.S., Sec. 2, Certiorari, where, in discussing the nature of certiorari at common law, it is said:

> "Certiorari is an extraordinary writ offering a limited form of review, its principal function being to keep inferior tribunals within their jurisdiction."

Illustrations of this principle are *Wm. Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtis Marine Turbine Co.*, (1912) 228 U. S. 645, 33 S. Ct. 722; 57 L. Ed. 1003 (decree by Circuit Court of Appeals of which judge giving *pro forma* decree below was a member); *In re Chetwood* (1896), 165 U. S. 433, 17 S. Ct. 385, 41 L. Ed. 782 (certiorari granted to revise order of circuit judge enjoining prosecution of writ of error in Supreme Court); *Delaware L. & W. R. R. Co.* v. *Rellstab* (1928), 276 U. S. 1; 48 S. Ct. 203, 72 L. Ed. 439, (certiorari granted to correct setting aside of judgment after term had adjourned); *Farrell* v. *O'Brien* (1905), 199 U. S. 89, 25 S. Ct. 727; 50 L. Ed. 101, (certiorari granted to determine jurisdiction of Circuit Court to admit Washington will to probate).

It seems obvious therefore that this ground was not intended to cover an allegedly erroneous decision on the merits or, as in this case, the exercise by a court of equity of its discretion to refuse relief where it feels that the granting of the relief prayed for would be more inequitable under the circumstances than withholding it.

Regardless, however, of technical considerations, we submit that the petition should be denied.

The petitioner's argument briefly summarized is as follows: This is a minority stockholder's suit brought for the benefit of Midwest to redress alleged wrongs to that corporation as the result of a sale of all its corporate assets to its dominant stockholder. Under these circumstances the dominant stockholder stands in the position of a trustee and the sale can be set aside if in any respect unfair. The action is derivative for the benefit of the corporation and the corporate fiction can not be disregarded so as to permit the recovery by the minority stockholder of his pro rata share. The lower courts, by granting the defendants' special motion, have failed to observe these (allegedly) accepted principles and in so doing have sanctioned a "radical departure from the accepted and usual course of judicial proceedings" which calls for the remedial action of this Court.

The defendants' contention is (1) that the action of the lower courts does not constitute a "radical departure from the accepted and usual course of judicial proceedings" and (2) even if it did, the action was entirely proper under the unusual circumstances of the case.

1. The action of the lower court in sustaining defendants' special motion does not constitute a "radical departure from the accepted and usual course of judicial proceedings."

The defendants maintain that the action of the District Court in granting defendants' special motion was nothing more than the exercise of the well established discretion of an equity court to deny relief where it would be inequitable to grant it.

Farmer v. *City of St. Paul,* (1896), 65 Minn. 176; 67 N. W. 990; 33 L. R. A. 199.

Miller vs. *Des Moines,* (1909), 143 Iowa 409; 122 N. W. 226.

Brasher, et al v. *Miller,* (1896), 114 Ala. 485; 21 So. 467.

J. B. Brown & Sons v. *Boston and Maine Railroad* (1909) 106 Maine 248; 76 Atl. 692.

Pomeroy Equity Jurisprudence, 4th Ed., Sec. 2215.

The petitioner seeks to create the impression that the decision of the District Court is a judgment for the petitioner in his individual right, thus disregarding the established doctrine that a minority stockholder's suit is a suit for the benefit of the corporation, that recovery must be by the corporation, and that the corporate fiction cannot be disregarded so as to allow the individual stockholder to recover personally his pro rata share. This is manifestly not the case. The lower court rendered no judgment for the petitioner in the true sense of the word. It simply incorporated into its decree dismissing the bill the offer of the defendants to pay the petitioner his pro rata share of all that could possibly be recovered on his own allegations. Although the decree in fact orders the defendants to pay said sum into court, it could just as effectively have decreed that, upon payment of said sum into court, the bill would be dismissed. In view of this it must be apparent that the lower court did nothing more than to exercise its undoubted right to refuse to grant the relief prayed for in the complaint. Defendants' offer in its special motion was simply an added consideration for the court in determining that it would be inequitable to grant such relief under the circumstances.

The situation is not, as petitioner seeks to imply, that the respondents in their special motion admitted liability to Midwest for the amounts claimed in prayers (d), (e), (f) and (g) of the amended bill, totalling some fifteen million dollars, and sought to avoid payment of that large amount

by paying the petitioner his pro rata share. On the contrary the special motion denied such liability but in effect said "The expense of contesting this action on the merits is so burdensome and so out of proportion to the plaintiff's interest in any recovery that could be had if all his allegations were true that, while denying liability, the respondents, in order to rid themselves of such burden, prefer to pay and offer to pay to the plaintiff his full pro rata share in any possible recovery under the bill and to make him whole by paying also his reasonable counsel fees and costs as determined by the Court. As the circumstances of the case and the lapse of years with no intervention by other stockholders demonstrate that plaintiff is the only stockholder who is interested, he should not be permitted to insist upon the carrying through of this litigation in the face of such an offer." What the District Court did was in effect to say: There is sense in what the defendants have said. The plaintiff, under the peculiar circumstances of this case, is found to be the only person interested in promoting this litigation and it is inequitable to permit him to force upon the defendants the trouble and expense therein involved when he can receive now under their offer all that he could get if the litigation were carried through and terminated completely in his favor.

The defendants say therefore that the procedure below did not constitute a radical departure from the accepted and usual course of judicial proceedings. There is nothing unusual or unaccepted in a court of equity refusing to grant the relief prayed for where an inequity would result. There is nothing unusual or unaccepted in a motion as the means of bringing some matter before a court of equity. The fact, if it were a fact, that no precedent can be found for bringing this particular recognized equitable principle before a court by this precise form of motion certainly does not constitute a radical departure from the accepted and usual course of judicial proceedings.

It is the same old stone in a different setting. Moreover the procedure here adopted is not without precedent. An offer to submit to the plaintiff's demands is recognized in equity practice as analogous to an offer to be defaulted. In *Whitehouse on Equity Practice,* Vol. 2, Sec. 327, it is said

> "When a defendant submits to the whole demand of the plaintiff and to pay the costs, he has a right to apply to the court to dismiss the bill or stay all further proceedings."

This principle has been applied to creditors' bills in a number of cases in which it has been held that the defendant is entitled to have the bill dismissed over the objection of the plaintiff creditor (no other creditor having intervened as a party) upon payment of the plaintiff's claim and costs.

Innes v. *Lansing,* (1839), 7 Paige (N. Y.) 583.

Pemberton v. *Topham,* (1838), 1 Beav. 316.

Thompson v. *Fisher,* (1881), 33 N. J. Eq. 480.

See also *Sivell* v. *Abraham,* (1846), 8 Beav. 598.

2. The action of the district court was entirely proper under the unusual circumstances of this case.

Even if this court feels that the decree of the District Court might amount to a novel and unprecedented method of disposing of minority stockholders' suits of this nature, the defendants maintain that the District Court was entirely correct in its decision in view of the exceptional circumstances of this case. In discussing this point we realize that in effect we are arguing the merits of the case, which are not before this Court on a petition for certiorari, and we should refrain from doing so were it not for the fact that the greater part of the petitioner's argument is directed to that end, and we feel therefore compelled not to allow those portions of petitioner's brief to remain entirely unanswered.

We have said before that this case is unique and that it is doubtful whether a similar one will ever arise again. Consider the situation. At the time of the sale complained of, all but four one-hundredths of one per cent of the stock of Midwest, or 241 shares out of 624,074, was owned by the defendant, Standard Oil Company, or its nominees. At the time defendants' special motion was filed, all of these 241 shares, with the exception of the plaintiff's 50 shares and 12 shares owned by Norwin S. Bean, had either accepted the liquidating dividend or been acquired by Standard. Bean had elected to have his shares valued under the Maine valuation statute. As a practical matter therefore no one else was interested in the proceeding except the petitioner. This in itself is a fact which is exceedingly unlikely to be duplicated. In addition all the allegations of the petitioner's bill with respect to the amount to be recovered are either definite or ascertainable by computation (contrary to the petitioner's claim there is no general or effective allegation of inadequacy of consideration, see comments under "Statement of Facts", supra p. 2), and the only other relief sought would involve rescission of a sale of over $80,000,000 worth of assets of all kinds made six years previously, an obviously impossible, impractical and economically wasteful procedure.

Under these circumstances what conceivable purpose is served by forcing the unscrambling of this eighty million dollar egg or the carrying through of a long and costly litigation in the face of an offer to pay the petitioner all he possibly could recover on his own allegations, together with such counsel fees and costs as the court should fix and determine. We submit that defendants' special motion, however novel, is simply plain common sense and that the court in refusing to grant relief exercised its discretion in the only reasonable way possible.

If, therefore, the corporate fiction was disregarded, it was an ideal case in which to do so. The corporate fiction has

often been disregarded where the ends of justice were served thereby. *Wormser, Disregard of the Corporate Fiction,* pp. 9 and 78.

Petitioner's argument, (p. 20 of his brief), based on the effect of the dismissal of the bill on the rights of possible creditors and on the Government's possible right to additional income taxes is, as the Circuit Court stated in its opinion, "beside the point" and seems so clearly so that we can conceive of its having no other object than to befog the issue or to seek to prejudice the Court. If any reply to this argument is needed, it would seem sufficient to say that in the many years this litigation has been pending no creditor has evidenced any interest in the proceeding by seeking to intervene, that there is no evidence in the case that there was an unpaid creditor of Midwest and that, if any creditor of Midwest in fact existed, Standard Oil Company, generally believed to be thoroughly solvent, assumed the liabilities of Midwest in connection with the purchase, as appears in the amended bill (R. p. 268). As to income taxes, it would seem sufficient to say that there is nothing in the record to show what income taxes were in fact paid, what, if any, claims the Government may have made, or what, if any, adjustments have been made and finally that the Treasury Department is generally supposed to be able to look after the interests of the United States without the aid of minority stockholder suits.

Petitioner further asserts that the District Court, by granting defendants' motion, deprived the non-complaining owners of 151 shares of stock of their pro rata share in any recovery by the corporation. Petitioner's solicitude for these silent and apparently satisfied stockholders in spite of the fact that he receives his full share under defendants' motion may conceivably spring from the highest of altruistic motives, but the fact remains that not one of these stockholders has intervened or evinced any interest in the proceeding dur-

ing the nine years it has been in court. Moreover they are not prejudiced by the dismissal since a suit by one of a class in behalf of all relieves all from the imputation of laches.

Overfield v. *Pennroad Corporation* (1941) 39 Fed. Supp. 482;

Southern Pacific Co. v. *Bogert* (1918) 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099.

Petitioner could at any time have dismissed the case without the consent of other stockholders, none having intervened as parties. From this as the Circuit Court said (R. p. 431) "follows the power of the court under the circumstances of this particular case, to decree a dismissal of the plaintiff's bill upon payment in full of all of his individual damages".

Finally the petitioner asserts that there is no evidence in the ex parte affidavits or elsewhere that the defendants would be put to burdensome expense in the defense of this litigation. This is the first time petitioner has advanced this argument as he did not raise it either in the District Court or the Circuit Court of Appeals. We submit however that the fact is self evident and a matter of judicial notice. Law suits involving over $15,000,000 and concerning transactions occurring far from the place of trial can be defended only at large expense. A reading of the amended bill of complaint alone will disclose the magnitude of the asserted claims and the trouble to which the defendants would be put to defend the case on the merits. Moreover a sufficient answer to this argument is that in effect it complains that the trial court erred in the determination of questions of fact or in other words that the decision was wrong on the merits which is clearly not open on a petition for certiorari.

CONCLUSION

In conclusion the respondents maintain that this Petition should be denied because the case does not fall within the

reasons for which certiorari will be granted, the dismissal of the petitioner's bill of complaint did not constitute a radical departure from the accepted and usual course of judicial proceedings and even if it did it was entirely proper under the peculiar circumstances of the case.

Respectfully submitted,

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